

# **DEPARTMENT OF ALCOHOL AND DRUG PROGRAMS HEALTH INSURANCE PORTABILITY AND ACCOUNTABILITY ACT (HIPAA) COVERED ENTITY ANALYSIS**

## **SUMMARY**

The Department of Alcohol and Drug Program's (ADP) analysis has concluded that ADP is a covered health plan under HIPAA by virtue of its role in the administration of the Drug Medi-Cal Program. Because, by law, ADP jointly administers Drug Medi-Cal with the Department of Health Services (DHS), it is not a Business Associate of DHS, but a separate "Covered Entity" working in conjunction with DHS. The HIPAA definitions of a health plan and the various definitions of a Covered Entity do not, however, describe ADP's administration of the Substance Abuse Prevention and Treatment (SAPT) federal block grant or the state-funded Substance Abuse and Crime Prevention Act (SACPA) programs. Therefore, neither SAPT nor SACPA are required to operate according to HIPAA rules.

## **DRUG MEDI-CAL (DMC)**

The Health Insurance Portability and Accountability Act of 1996 (HIPAA) legislation identifies state Medicaid programs as health plans. Thus, the California Medi-Cal program is a covered entity that must comply with the Transactions and Code Sets, Privacy, Security and other HIPAA rules.

The Department of Health Services (DHS) is the Single State Agency designated by the Federal Government to administer Medicaid in California (Medi-Cal). The Department of Alcohol and Drug Programs (ADP) administers Drug Medi-Cal substance abuse services through an Interagency Agreement with DHS.

The California Health and Safety Code mandates the Interagency Agreement (IAA) between ADP and DHS. ADP functions and responsibilities spelled out in the current IAA include:

- Administer funding and provide reimbursement for EPSDT and Minor Consent services
- Provide the nonfederal share of the cost of services and administration
- Submit invoices and maintain records reflecting actual expenditures
- Ensure the quality, appropriateness and availability of services
- Ensure that each county maintains current contracts with providers
- Review and certify providers to participate in the Drug Medi-Cal program

Title 22 of the California Code of Regulations (CCR) states that ADP shall:

- Provide administrative and fiscal oversight, monitoring, and auditing for the provision of statewide Drug Medi-Cal substance services;
- Ensure that utilization review is maintained through on-site post service post payment utilization review; and
- Demand recovery of payment in accordance with the provisions of this regulation.
- Reimburse providers for substance abuse services to Medi-Cal beneficiaries
- Establish statewide maximum allowances for reimbursement
- Receive and manage appeals

The HIPAA Privacy Rule preamble states:

*Where a public agency is required or authorized by law to administer a health plan jointly with another entity, we consider each agency to be a covered entity with respect to the health plan functions it performs...joint administration does not meet the definition of a 'business associate'.*

Does ADP's Drug Medi-Cal authority comprise *joint administration* of the Medi-Cal program, or does it only require ADP to act *on behalf of DHS*? State law requires that ADP participate in the administration of Drug Medi-Cal. Other factors leading to the conclusion of joint administration:

- State budget authority for Drug Medi-Cal is equally divided between DHS and ADP.
- ADP has a broad range of responsibilities for Drug Medi-Cal administration.
- Counties and providers generally regard ADP as the administrator of Drug Medi-Cal.

### **SUBSTANCE ABUSE PREVENTION AND TREATMENT (SAPT) AND SUBSTANCE ABUSE AND CRIME PREVENTION ACT FUNDING (SACPA)**

The HIPAA Privacy Rule states that a government-funded program (other than one, such as Medicaid, named in the definition of a health plan), is not a health plan if its principal purpose is the provision of health care either directly or by grant.

The fact that ADP administers federal **Substance Abuse Prevention and Treatment (SAPT)** funds by allocating them to counties on a population-driven formula, rather than by reimbursing providers on a service or capitation basis supports the conclusion that SAPT funds, at least at the State level, do not constitute a health plan under HIPAA. The system for administering SAPT funds, Net Negotiated Amount (NNA) contracts with counties, also transfers State General Fund dollars to the counties. While the NNA contracts are not designated as grants, they behave very much like grants for the provision of health care. The counties use the SAPT funds to deliver health care in their communities – operating their local programs with considerable local control – as

opposed to using the funds to provide goods or services to be used by ADP or to fulfill ADP's duties. The latter would be more consistent with a "contract" label. What actually happens is more consistent with a "grant" label, although that label is not used in the NNA process at this time.

State funds from Proposition 36, the **Substance Abuse and Crime Prevention Act (SACPA)** provide funding and a regulatory structure for treatment services for eligible convicted drug offenders. However, there is no *direct* relationship between ADP and the participants before, or for that matter, during or after the time that treatment services are provided. As with the SAPT funds, there is no client-specific enrollment or billing to ADP. SACPA creates a new sentencing scheme that favors treatment over incarceration. The provision of funding to cover counties' costs in implementing this scheme does not make it a health plan under HIPAA.

For SAPT, SACPA and other funds, it is possible that ADP could organize its activities in a way that might make it a health plan or some other form of covered entity. But it has not done so.

***Disclaimer: This analysis and its conclusions apply only to ADP***

*ADP's status under HIPAA is a legal question that cannot be answered with certainty because there is as yet no case law to support or inform our interpretation of HIPAA definitions. The covered entity issue should be re-examined when relevant case law develops, or if ADP changes its approach to administering the Drug Medi-Cal, SAPT, or SACPA programs.*